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4 No. 48365-3-II
5 COURT OF APPEALS, DIVISION TWO
6 OF THE STATE OF WASHINGTON

7
8 Skamania County Superior Court nos.
9 13-1-00092-8

10 STATE OF WASHINGTON,
11 Respondent

12 vs.

13 STEVEN PESCHL,
14 Appellant

15 SUPPLEMENTAL BRIEF OF RESPONDENT
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18

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5 **I. APPELLANT’S ASSIGNMENT OF ERROR**

- 6 1. The trial Court erred in entering findings of fact: 1; 2; 6; 7; 8; 10;
7 16; 17; 20; and 21.
8 2. The trial Court erred in entering conclusions of law 1 and 2.
9 3. The evidence presented does not support a finding that the area
10 fully enclosed by fence is fully enclosed by a fence.

11 **II. RESPONSE TO APPELLANT’S CLAIMS**

- 12 1. The trial Court’s findings are proper and consistent with the trial
13 record.
14 2. The trial Court’s conclusions of law are proper and in keeping with
15 the Court’s role as finder of fact at trial in this case.
16 3. The evidence presented at trial establishes conclusively that the
17 area belonging to the road department is a fully enclosed fenced
18 area.
19

20 **III. ARGUMENT**

- 21 1. The trial Court entered certain findings of fact in error.

22 The Appellate Court reviews whether the trial court's findings of
23 fact are supported by substantial evidence and whether the findings
24

1 support the court's conclusions of law. State v. Garvin, 166 Wash.2d 242,
2 249, 207 P.3d 1266 (2009). Substantial evidence is evidence sufficient to
3 convince a reasonable person of the truth of the trial court's finding. State
4 v. Hill, 123 Wash.2d 641, 644, 870 P.2d 313 (1994). The Appellate Court
5 defers to the fact finder on issues of conflicting testimony, witness
6 credibility, and persuasiveness of the evidence. State v. Thomas, 150
7 Wash.2d 821, 874-75, 83 P.3d 970 (2004).

8
9 **a) Finding of Fact 1: The defendant was caught in the act of**
10 **stealing gas and scrap metal from the Skamania County Shops.**

11 In this case the court was acting as finder of fact in a bench trial.
12 The court's initial finding went to the ultimate issue of fact and was stated
13 during the ruling. (RP 11/24/20185 at 74). The courts finding is supported
14 by the testimony of Dep. Johnston who observed the defendant's vehicle
15 filled with scrap metal after contacting him behind a county shop building,
16 (RP11/24/2015 at 17, 20, and 25-27), the testimony of Dep. Helton who
17 indicated he observed scrap metal consistent with what was located in the
18 appellant's vehicle stored in the motorpool building where the defendant
19 was parked and other metal items in the midst of being transported based
20 upon their location and the disturbance of the dew and grass surrounding
21 them further supports the finding. (RP 11/24/2015 at 42-43). Finally, the
22 courts finding is further supported by the testimony of County Facility
23 Maintenance Manage of County Buildings and Grounds Department, Don
24 Clack, who was in charge of the area where the scrap metal was being

1 taken, testified that the scrap metal in the back of the appellant's truck
2 belonged to Skamania County and that the defendant did not have
3 permission to be there or in possession of those items. Don Clack further
4 testified that the scrap metal had at the very least scrap value. (RP
5 11/24/2015 at 45-50). The above testimony provides a basis for the courts
6 initial finding as to one of the ultimate issues of fact.

7 **b) Finding of Fact 2: A lay witness, Wayne Martin, observed**
8 **movement in an enclosed fenced area, belonging to Skamania**
9 **County, which raised his suspicions and drove by twice to**
10 **confirm what he had seen.**

11 The court's finding 2 was made at oral ruling after bench trial (RP
12 11/24/2105 at 74) and is directly supported by the testimony of the witness
13 Wayne Martin who testified precisely to the finding that as a life long
14 resident he was traveling past a fenced area he new as the Rock Creek
15 County shops and observed movement and when returning to confirm saw
16 legs and called the Skamania County Sheriff's Office based upon that
17 observation. (RP 11/24/2015 6-10). Further, the fenced nature of the area
18 where the appellant was observed was reinforced by the testimony of
19 Deputy Helton who indicated that the area of the the sign shop and truck
20 shop operated by the County Road Department is fully fenced (RP
21 11/24/2015 39-40). Finally, additional testimony was given by Skamania
22 County Road Maintenance Superintendent, Clay Moser, that the fenced
23 area encloses the departments shop yard and fully encloses the area. (RP
24 11/24/2015 at 50-54).

1 **c) Finding of Fact 6: The defendant's truck was backed into the**
2 **area it was located in a very deliberate manner rather than less**
3 **formally.**

4 The court's finding 6 was made by the court in oral ruling after the
5 bench trial (RP 11/24/2015 at 74). This finding is supported by the
6 testimony of Dep. Johnston, who testified that he observed the appellant's
7 vehicle parked, backed in between the north side of the motorpool
8 building and a hedge which lies on the southside of the sidewalk. This
9 location was marked on exhibit 12 with a "V". (RP 11/24/2015 at 17,18).

10 **d) Findings of Fact 7: At the location where movement was seen**
11 **by the lay witness there was an odor of gasoline in the air**
12 **smelled by the Skamania County Deputy investigating the**
13 **area.**

14 The court's finding 7 was made by the court during oral ruling
15 after bench trial (RP 11/24/2015 at 75). The finding is supported by the
16 testimony given establishing the fenced area of the Road department shops
17 (Id.) and the testimony of Dep. Helton who testified that he entered into
18 the fenced area and smelled the odor of gasoline upon entering the fenced
19 area (RP 11/24/2015 at 38-40).

20 **e) Finding of Fact 8: The area where the movement was scene by**
21 **the lay witness and gasoline was smelled by the Skamania**
22 **County Deputy was within a fully enclosed fenced area.**

23 The court's finding 8 was made during oral ruling after bench trial
24 (RP 11/24/2015 at 75). This finding is supported by the earlier cited

1 testimony of Dep. Helton, Wayne Martin, and Clay Moser (Id.)
2 establishing the fully fenced nature of the area of the Road Department
3 Yard and what was seen and smelled at that location.

4 **f) Finding of Fact 10: A fuel spout was located in the fenced area**
5 **that fit the fuel container discovered next to the defendant's**
6 **truck.**

7 The courts finding 10 was made at oral ruling after bench trial (RP
8 11/24/2015 at 75). This ruling is supported by the testimony of Dep.
9 Helton who testified that he discovered a fuel can funnel which he
10 screwed onto the gas can recovered from the appellant and it fit (RP
11 11/24/2015 at 40-41).

12 **g) Finding of Fact 16: The defendant penetrated into the**
13 **completely enclosed area to the north in exhibit 12, which is**
14 **owned by Skamania County.**

15 The court made finding 16 during oral ruling after bench trial. (RP
16 11/24/2015 at 75). This finding is supported by previously cited testimony
17 of Dep. Helton and Clay Moser that the area was fully fenced and
18 enclosed, the previously cited testimony of Dep. Helton that he smelled
19 strong odor of gasoline and discovered a fuel funnel which fit the gas can
20 in the appellant's possession, and the testimony of Wayne Martin who
21 testified to seeing an individual inside the fenced which gave rise to him
22 calling the Skamania County Sheriff's Office and observed someone leave
23 the fenced area and travel to the across the road to a new location. Mr.
24 Martin then testified that he observed the Skamania County Sheriff's

Deputies arrive on scene and go to the area where he had seen the individual who left the fenced area travel to. (RP 11/24/2015 at 6-15).

Subsequently, there was testimony, as cited before, of Dep. Johnston that he contacted the appellant and his vehicle parked backed in between the northside of the County motorpool and a hedge with a gas can. (Id.)

h) Finding of Fact 17: The defendant's entry into the fenced area was unlawful and was with the intent to steal, at the very least petrol, and the defendant may very well have done that.

The courts finding 17 was made during oral ruling after bench trial (RP 11/24/2015 at 75,76). The finding is supported by the previously cited testimony of Dep. Helton and Clay Moser indicating that the Road department yard is a completely fenced enclosed area. (Id.) The finding is further supported by the previously cited testimony of Dep. Helton that there was a strong an odor of gasoline when he entered the fenced area and that he discovered a fuel funnel which fit the gas can discovered with the appellant, and the previously cited testimony of Wayne Martin that he had seen a person within the fenced area and saw that person leave the fenced area a travel to a new location where the appellant was subsequently contacted by the Skamania County Sheriff's Office. (Id.). Finally Dep. Johnston testified that the appellant indicated to him that he was out of gas and Dep. Johnston found further evidence that the defendant was in the process of attempting to siphon fuel at his new location at the motorpool. (RP 11/24/2015 at 17-8, 24-25, 28-29).

i) Finding of Fact 20: The defendant is guilty of Burglary in the

Second Degree as charged.

The courts finding 20 was made at oral ruling after bench trial (RP 11/24/2015 at 76). The court was acting as finder of fact in this case and made a finding as to the ultimate issue as is appropriate in that role.

j) Finding of Fact 21: The defendant is guilty of Theft in the Third Degree as charged.

The courts finding 20 was made at oral ruling after bench trial (RP 11/24/2015 at 76). The court was acting as finder of fact in this case and made a finding as to the ultimate issue as is appropriate in that role.

The findings of fact entered in this matter are a recitation of the oral findings made by the court after the bench trial, as evidenced by the citation in the record of each finding, and are in no way tailored to represent anything other than the courts position after trial. The courts findings are supported by the testimony presented at trial and are proper.

2. The trial Court erred by entering conclusions of law 1 and 2.

a. Conclusion of Law 1: A person is guilty of Burglary in the Second Degree when with the intent to commit crime against persons or property therein he enters or remains unlawfully in a building other than a vehicle or dwelling.

The court's conclusion of law is consistent with RCW 9a.52.030(1) and is nearly a recitation of the statute.

b. Conclusion of Law 2: Building includes a fenced area as defined by case law.

1 The court's conclusion 2 was made by oral ruling after bench trial.
2 The court stated specifically, "Building also includes fenced area, which is
3 not defined in the criminal code..." (RP 11/24/2015 at 74). The findings
4 and conclusions filed in the trial court do contain a scrivener's error
5 indicating "fended area" versus "fenced area" but the court's oral ruling
6 makes clear this was meant to mean fenced. The court's conclusion 2 is
7 supported by WPIC 2.05 which gives the definition of building for the
8 purpose of burglary prosecution and is based upon the definition provided
9 in RCW 9A.04.110(5). Further the Supreme Court has indicated that 'Building',
10 in addition to its ordinary meaning, includes any ... fenced
11 area,..." RCW 9A.04.110(5). "Fenced area" is not defined in the criminal
12 code. State v. Engel, 166 Wn.2d 572, 210 P.3d 1007 (Wash. 2009).

13 The court's conclusions of law is an appropriate statement of the
14 law and proper.

15 3. The evidence does not support a finding that there is a fully
16 enclosed fenced area.

17 As already cited there is substantial testimony that the area North
18 of the road identified by Wayne Martin, Dep. Helton, and Clay Moser as
19 the County Road Department Yard which houses the sign shop and road
20 department truck shop is fully fenced and enclosed, and it was at this
21 location that Mr. Martin first saw movement and "legs" within the fenced
22 area by a truck. Dep. Helton in investigating that area smelled the odor of
23 gasoline and located a fuel can funnel which fit the fuel can in the
24 appellant's possession. Clay Moser testified that the appellant and ho


1 authority to be in the fenced area and identified as being fully enclosed.
2 (Referenced to the record made above Id.).

3 The appellant appears to be conflating the location of the fully
4 enclosed fenced area of the County Road Department Yard and the
5 Motorpool Building across the street where the appellant was observed
6 traveling to upon leaving the fenced area and was subsequently contact by
7 law enforcement in possession of the scrap metal and siphoning materials.
8 The appellant's argument regarding there not being a completely fenced
9 area at the Road Department Yard is in error.

10 **IV. CONCLUSION**

11 The state respectfully submits that the Findings and Conclusions entered
12 in the trial court are appropriate and the appellant's analysis of the
13 testimony is in error and appears to conflate to different locations, the
14 County motorpool building and the County Road Department Yard.
15

16
17 RESPECTFULLY SUBMITTED this 27th day of March, 2017.

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19 
20 DANIEL C. MCGILL, WSBA# 39129
21 Skamania County Deputy Prosecuting Attorney
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SKAMANIA COUNTY PROSECUTOR
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Court of Appeals Case Number: 48365-3

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